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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 775

HARRY BROWN,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York, First Judicial Department, which affirmed the Judgment of Conviction of the Supreme Court of the State of New York, Bronx County. Leave to appeal to the Court of Appeals of the State of New York, made to a Judge thereof was denied.

Opinions Below

The opinion of the Supreme Court of the State of New York, Bronx County, Trial Term Part XVII, by Mr. Justice McCaffrey, the trial Justice, is the only opinion in the case. It is not otherwise reported, and appears in the certified record (RR 65-70) and is reproduced in the appendix. The Appellate Division of the First Department, New York Supreme Court affirmed without opinion April 2, 1968 (29 A. D. 2d 1049) (R 84), and leave to appeal to the Court of Appeals was denied September 4, 1968 (R 85 & R 89).

Jurisdiction

Judgment of conviction was affirmed by the Appellate Division April 2, 1968, leave to appeal to the Court of Appeals of the State of New York was timely made, and the application was denied on July 8, 1968 (R 85). An application to reargue was timely made July 31, 1968 (RR 86-88) and denied on September 4, 1968 (R 89).

The jurisdiction of this Court is invoked pursuant to the authority of 28 U. S. C. 1257(3).

Questions Presented

Does the exemption of peace officers from the provisions of a penal law which makes it a felony to carry a handgun apply to a peace officer who after being suspended is, at his request, placed on leave without pay, when such peace officer was never removed from his position by required

disciplinary proceedings? Does his conviction of the felony on the basis that he did not retain his exemption, deprive him of equal protection of the laws and due process of law?

Constitutional and Statutory Provisions Involved

The pertinent provisions are set forth in the appendix:

United States Constitution, Amendment XIV, §1.
Civil Service Law, Section 75(1a, 1b) (*McKinney's Consol. Laws,* Book 9, p. 200 [1959]).
Penal Law §1897(2) (*McKinney's Consolidated Laws,* Book 39, p. 613 [1967]).
Penal Law §1900(a-1-a) (*McKinney's Consolidated Laws,* Book 39, p. 613 [1967]).
Code of Criminal Procedure, §154 (*McKinney's Consolidated Laws,* Book 66, Part I, p. 325 [1958]).

Statement of the Case

The Petitioner was indicted for violation of Section 1897(2) of the *Penal Law* which makes it a felony to carry a loaded firearm and for two other charges which were not brought to trial and which are not herein involved (RR 1-3). The Court in its opinion found that the Petitioner was a uniformed court officer of the Criminal Court of the City of New York who had been suspended and thereafter at his request placed on leave of absence without pay and was granted an indefinite leave of absence without pay, and held that status when he was apprehended with a loaded firearm (R 67). The Court thereupon recognized that Section 1900 of the *Penal Law* exempts "peace officers as defined in Section 154 of the *Code of Criminal*

Procedure" from Section 1897 of the *Penal Law* (R 68). Section 154 of the *Code of Criminal Procedure* was recognized by the Trial Justice as including a uniformed court officer of the Criminal Court of the City of New York within the definition of peace officer. The Court concluded that the Petitioner did not retain the exemption and found him guilty (R 69) and he was given a suspended sentence (R 73). The determination was made despite the Petitioner's insistence that he still retained his exemption (R 59). People's Exhibit 4 in evidence Petitioner's employment record (R 75), which was before the Trial Justice, indicates that the Petitioner is a veteran. The Petitioner excepted to the finding of guilt (R 69). Said record of employment does not indicate any disciplinary hearing on stated charges or disciplinary dismissal arising from any hearing. The only issue is whether the Petitioner retained his exemption and was deprived of equal protection of the laws and due process of law by his conviction. An appeal as of right to the Appellate Division of the Supreme Court from each and every part of the judgment of conviction was timely made (R 83) and judgment was affirmed without opinion (R 84). Leave to appeal to the Court of Appeals was denied (R 85) and reargument of the application was denied (R 89).

Federal Question to Be Reviewed

The question of whether the Petitioner was denied equal protection of the laws and due process of law arose when Petitioner moved to dismiss the case at the end of the People's case by claiming that he enjoyed the exemption of Section 1900 of the *Penal Law;* decision was reserved (R 60). Petitioner rested on the entire case (R 62). The Court thereafter rendered its decision concluding that the Petitioner did not have the exemption, which determination was duly excepted to by the Petitioner (R 69). Thereafter, in the application to Judge Breitel of the Court of Appeals to reargue the issue of leave to appeal, it was contended that the only way the Petitioner, a veteran, could be removed from his position was after a hearing on stated charges with a right to counsel, as is required by Section 75 of the *Civil Service Law* (R 87) and that "By his exclusion from that group in a manner other than that procedure required to remove him, he was thereby denied equal protection of the Laws under the United States Constitution" (R 87). The argument was rejected (R 89).

Reasons for Granting the Writ

The Fourteenth Amendment to the *United States Constitution* requires that all persons of a given class be treated equally by the states and the uniform application of the Penal Statutes of the states is of paramount importance in achieving this end.

In this case the Trial Judge recognized "the unique facts of this case" (R 68). It should be noted that the leave of absence took place June 19, 1964 (R 76) and that the

Petitioner was still carried as an employee, receiving a salary increase to $7,693.00 on July 1, 1964 (R 75). He was a veteran (R 75) and as such could only be dismissed after a hearing on stated charges with a right to counsel under the provisions of Section 75, *Civil Service Law*. Unless such dismissal so founded took place, the Petitioner remained a Uniformed Court Officer. The Trial Justice, in excluding this Petitioner from the exemption of *Penal Law* §1900, in effect removed Petitioner from his position without such a disciplinary hearing held by his supervisors. The Trial Court added limits to the definition of "peace officer" which do not appear in the wording of the statute. If the Legislature wished to limit the term "peace officer" it could have done so. The conviction of the Petitioner should not be the vehicle by which the penal statute is expanded beyond its terms or modified. The Petitioner should not be required to bear this burden. The statutes are clear and unambiguous and do not require interpretation at the expense of this Petitioner.

Exemptions in penal statutes are to be construed liberally in favor of a person charged with a violation of the statute. *Schyler* v. *So. Pac. Co.*, 37 Utah 581, 109 P. 458; rehearing denied, 37 Utah 613, 109 P. 1025; aff'd 227 U. S. 601; *State* v. *Hill*, 189 Kan. 403, 369 P. 2d 365.

Section 1900 of the *New York Penal Law* is in clear terms and did not need construction. The Petitioner was a peace officer and remained so in the absence of a disciplinary hearing to remove him as required to remove veterans under *Civil Service Law* §75. Had the Legislature desired to limit "peace officer" to those on actual duty, it would have done so. Many state legislatures have similar exemptions to the weapons felonies in their statutes and

do limit the term peace officer to those on actual engagement of duty. Some of these states are: Arkansas: *Ark. Stat.,* Title 41, §41-4501; California: *Penal Code,* §12027; Arizona: *Revised Statutes,* §13-911. New York is not unique in failing to limit the term "peace officer" as do the foregoing states. Some other states which do not limit the term in their exemption provisions to the weapons felony are: Delaware: *Code,* Title 11, §461(g); Florida: *Fla. Stat. Ann.,* §790.01; Illinois: *Ill. Ann. Stat.,* Ch. 38, §24-2 (a)(1); Michigan: *Title 28,* §28:428.

It is therefore quite apparent that the legislative intent was not overlooked in the wording of the statute. It is further apparent that the widespread usage of the exemption by various states makes this case one of national significance. A clear definition of equal protection of the laws in the circumstances of the case at bar would have nationwide application in serving as a precedent to courts faced with clearly worded statutes who feel a need to add to or detract from the statute's plain meaning.

CONCLUSION

The Petitioner, having exhausted his state remedy, has been denied equal protection of the laws and due process of law; the circumstances thereof are of national significance and the requested Writ of Certiorari should be granted.

Respectfully submitted,

RONALD PODOLSKY
Attorney for Petitioner

Order of Affirmance on Appeal From Judgment

(R 84)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 2nd day of April, 1968.

Present—Hon. Bernard Botein,
Presiding Justice,
" Harold A. Stevens,
" Samuel W. Eager,
" Owen McGivern,
" Benjamin J. Rabin,
Justices.

Remittitur

The People of the State of New York,

Respondent,

—against—

Harry Brown,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County, rendered on May 19, 1967, convicting the defendant of the crime of Possession of a Loaded Firearm as a Felony [Penal Law, §1897, subd. 2], and said

Order of Affirmance on Appeal From Judgment

appeal having been argued by Mr. Herman Blitz, of counsel for the appellant, and by Mr. Daniel J. Sullivan, of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

HYMAN W. GAMSO
Clerk.

Letter Denying Leave to Appeal

(R 89)

(Letterhead of Charles D. Breitel, *Judge*)

74 Trinity Place
New York, N. Y. 10006
September 4, 1968

Ronald Podolsky, Esq.
Fifteen Park Row
New York 38, New York

Re: People vs. Harry Brown
Indictment 1334/1966

Dear Mr. Podolsky:

The additional papers you have submitted in connection with the defendant's application for leave to appeal in the Court of Appeals has been referred to me and considered an application for reconsideration of the denial of leave to appeal on July 8, 1968.

After the most careful consideration, insufficient basis is found to warrant any change in the determination previously made.

Very truly yours,

CHARLES D. BREITEL

cc: Hon. Isidore Dollinger
Hon. Raymond J. Cannon

Certificate Denying Leave

(R 85)

STATE OF NEW YORK

COURT OF APPEALS

Before:

HON. CHARLES D. BREITEL,

Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

HARRY BROWN,

Defendant-Appellant.

I, CHARLES D. BREITEL, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to §520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Certificate Denying Leave

Dated at New York, New York
July 8, 1968

CHARLES D. BREITEL
Associate Judge

* HERMAN BLITZ, Esq.
435 East 161st Street
Bronx, N. Y. 10451

DANIEL J. SULLIVAN, Esq.
Assistant District Attorney
851 Grand Concourse
Bronx, N. Y. 10451

HON. RAYMOND J. CANNON
Clerk, Court of Appeals
Albany, N. Y. 12207

* Briefs, Appendix and Order returned herewith

Indictment

(RR 1-2)

SUPREME COURT

IN AND FOR THE COUNTY OF BRONX

THE PEOPLE OF THE STATE OF NEW YORK

—against—

HARRY BROWN,

Defendant.

The Grand Jury of the County of Bronx, by this indictment accuse defendant, Harry Brown, of the CRIME OF ASSAULT IN THE FIRST DEGREE, committed as follows:

The said defendant, in the County of Bronx, on or about the twenty-eighth day of March, 1966, with intent to kill, feloniously did assault one Kenneth McGee, and did aim and present a loaded pistol, revolver and firearm at the said Kenneth McGee.

SECOND COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the said defendant of the crime of ASSAULT IN THE SECOND DEGREE, committed as follows:

The said defendant, in the County of Bronx aforesaid, on or about the 28th day of March, 1966, feloniously did assault the said Kenneth McGee, and did wilfully and

wrongfully aim and present a loaded pistol, revolver and firearm at the said Kenneth McGee, the same being a weapon, instrument and thing likely to produce grievous bodily harm.

THIRD COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the said defendant, of the crime of VIOLATION OF SECTION 1897 OF THE PENAL LAW, Subdivision 2, a Felony, committed as follows:

The said defendant, other than in his home or in his place of business, in the County of Bronx aforesaid, on the day and in the year aforesaid, not then being any of the persons mentioned and described in Section 1900 of the Penal Law, unlawfully did have in his possession a certain firearm which was then and there loaded with ammunition, being the same firearm mentioned and described in the other counts of this indictment and connected therewith.

All of the acts and transactions alleged in the foregoing counts of this indictment are joined in one indictment, pursuant to the authority of Section 279 of the Code of Criminal Procedure.

ISIDORE DOLLINGER,
District Attorney.

Extract of Clerk's Minutes of Trial and Judgment

(R 82)

At a term of the Supreme Court of the State of New York, County of Bronx, 851 Grand Concourse, in the County of the Bronx, City of New York

HARRY BROWN is in due form of law arraigned at the bar before the Hon. Charles G. Tierney, Justice of the Supreme Court on October 7, 1966 upon an Indictment No. 1334—1966 filed July 21, 1966 for Assault 1st and 2nd Degrees and Vio 1897 subd. 2 Penal Law—a felony. The defendant pleads not guilty thereto.

Present:

THE HONORABLE EDWARD T. MCCAFFREY,
Justice of the Supreme Court.

* * * * *

(b) Whereupon the defendant waives a jury trial and is tried before the Hon. Edward T. McCaffrey, Justice of the Supreme Court, who finds the defendant guilty of Violation Section 1897-2 Penal Law, a felony.

Extract of Clerk's Minutes of Trial and Judgment

May 19, 1967

Present:

THE HONORABLE EDWARD T. MCCAFFREY,
Justice of the Supreme Court.

The defendant is arraigned at the bar, in the presence of his attorney whereupon it is considered, ordered and adjudged by the Court, that the said Harry Brown for the felony whereof he is convicted sentence is suspended.

A true extract from the minutes

JOHN J. HANLEY
Clerk of the Supreme Court

Decision, McCaffrey, J., Trial Justice

(R 66-R 69)

* * * * *

The Court: The defendant was indicted for assault in the first degree, assault in the second degree, and violation of Section 1897 of the Penal Law, subdivision two, a felony.

On February 3, 1967, the two assault counts of the indictment were severed. The third count was tried without a jury.

Defendant is a uniformed court officer of the Criminal Court of the City of New York. He was suspended from that position on or about June 5, 1964. On June 19, 1964, he requested a leave of absence without pay until such time as criminal charges against him in Westchester County were determined, and on June 24, 1964 he was granted an indefinite leave of absence without pay.

On June 22, 1964, a letter was sent to the Police Department advising them that the defendant's uniformed court officer badge was not received by the clerk of the Criminal Court, although defendant apparently advised that it was mailed, and that any use of said badge after June 5, 1964 was improper.

It is also germane to the instant action that on April 26, 1963, pursuant to the request of the Administrative Judge of the Criminal Court of the City of New York, the defendant advised that he did not have firearms of any sort.

On March 28, 1966 he was apprehended and charged as aforesaid. A court officer's badge was found in his possession, as well as a loaded revolver.

Decision, McCaffrey, J., Trial Justice

Section 1900 of the Penal Law exempts "peace officers as defined in Section 154 of the Code of Criminal Procedure," from Section 1897 of the Penal Law. Section 154 of the Code of Criminal Procedure states that a "uniformed court officer of the Criminal Court of the City of New York" is a peace officer.

There is no question that the defendant did have a loaded gun at the time of his arrest. Therefore, the only question to be resolved here is whether or not, based upon the unique facts of this case, the defendant retained his exemption. If the conditions which warrant carrying a weapon ceased, the right to carry a weapon also ceased. Keeping in mind the particular facts of the instant case, it is to be noted that under no conditions other than reinstatement and return to the job could the defendant perform or would he have the obligation so to perform any of the duties incumbent upon a uniformed court officer.

His badge was requested by the authorities; he did not surrender it. It can be safely said that if defendant's letter of April 26, 1963 had indicated otherwise, the firearm would have been picked up.

Further keeping in mind that the leave of absence at the time of the instant case had already extended for a protracted period of almost two years, it cannot be maintained that the defendant was a peace officer within the purview and intent of Section 154 of the Code of Criminal Procedure and therefore entitled to the exemption of Section 1900 of the Penal Law.

Thus the Court finds, the facts not being in dispute, that the defendant is guilty as charged in the third count of the indictment.

All motions heretofore held in abeyance are denied.

• • • • •

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XIV, Section 1:

> No State shall . . . deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Service Law, Section 75 (McKinney's Consol. Laws, Book 9, p. 200 [1959]):

> §75. Removal and other disciplinary action
>
> 1. Removal or disciplinary action. A person described in paragraph (a) or paragraph (b) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.
>
> (a) A person holding a position by permanent appointment in the competitive class of the classified civil service, or
>
> (b) a person holding a position by permanent appointment or employment in the classified service of the state or in the several cities, counties, towns, or villages thereof, or in any other political or civil division of the state or of a municipality, or in the public school service, or in any public or special district, or in the service of any authority, commission or board, or in any other branch of public service, who is an honorable discharged member of the armed forces of the United States having served therein as such member in time of war as defined in section eighty-five of

this chapter, or who is an exempt volunteer fireman as defined in the general municipal law,[1] except when a person described in this paragraph holds the position of private secretary, cashier or deputy of any official or department.

Penal Law, §1897(2) (McKinney's Consolidated Laws, Book 39, p. 613 [1967]):

Any person who has in his possession any firearm which is loaded with ammunition, or who has in his possession any firearm and, at the same time, has in his possession a quantity of ammunition which may be used to discharge such firearm is guilty of a felony . . .

Penal Law, §1900 (McKinney's Consolidated Laws, Book 39, p. 614 [1967]):

a. Section 1897, 1898, 1899 shall not apply to:

1. Possession of any of the weapons, instruments, appliances or substances specified in Section 1897 by the following:

(a) Persons in the military service of the State of New York when duly authorized by regulations issued by the chief of staff to the governor to possess the same, and peace officers as defined in Section 154 of the Code of Criminal Procedure.

Code of Criminal Procedure, §154 (McKinney's Consolidated Laws, Book 66, Part I, p. 325 [1958]):

Who are peace officers. A peace officer is . . . a clerk, uniformed court officer or other official of the Criminal Court of the City of New York . . .